FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Nos. 1D21-3629
1D22-1321
(Consolidated for disposition)

NATHANIEL WHITE,

Appellant,

v.

DISCOVERY COMMUNICATIONS, LLC, d/b/a INVESTIGATION DISCOVERY; et al.,

Appellees.

On appeal from the Circuit Court for Leon County.
Angela C. Dempsey, Judge.

May 10, 2023

BILBREY, J.

Nathaniel White appeals two final orders, one dismissing four nonresident defendants for lack of personal jurisdiction, and the other granting a different defendant's motion for summary judgment based on federal law and dismissing that defendant as well. We affirm both orders as explained below.

Mr. White sued various nonresident defendants for damages in tort resulting from an episode of a reality/crime television show entitled "Evil Lives Here." Mr. White alleged that beginning with

the first broadcast of the episode "I Invited Him In" in August 2018, he was injured by the broadcasting of the episode about a serial killer in New York also named Nathaniel White. According to the allegations in the amended complaint, the defamatory episode used Mr. White's photograph from a decades-old incarceration by the Florida Department of Corrections. Mr. White alleged that this misuse of his photo during the program gave viewers the impression that he and the New York serial killer with the same name were the same person thereby damaging Mr. White.

Dismissal for Lack of Personal Jurisdiction — 1D21-3629

In his amended complaint, Mr. White alleged that the trial court had personal jurisdiction over all the defendants under the Florida long-arm statute because they had all committed tortious acts within Florida. *See* § 48.193(1)(a)2., Fla. Stat. Mr. White also alleged that each defendant committed "intentional torts expressly aimed" at him, "calculated to cause injury in Florida." Mr. White's cause of action specified the tort of defamation by libel.

A plaintiff bears the burden of pleading a basis for jurisdiction under the Florida long-arm statute, section 48.193. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). Tracking the language of section 48.193 without pleading supporting facts is enough to meet this initial burden. *Hilltopper Holding Corp. v. Estate of Cutchin*, 955 So. 2d 598, 601 (Fla. 2d DCA 2007). Here, the amended complaint tracked the statutory language of section 48.193(1)(a)2. by alleging that the defendants had committed tortious acts in Florida.

In response to the amended complaint, defendants (now appellees in case 1D21-3629) Red Marble Media, Inc., a New York corporation and three Red Marble corporate officers, Kevin Fitzpatrick, Stephen Dost, and Jonathan Santos, moved to dismiss under rule 1.140(b), Florida Rules of Civil Procedure. These four defendants argued that the amended complaint lacked sufficient jurisdictional allegations that any of them committed the tort of defamation to subject them to Florida's long-arm statute. They also claimed that they lacked the requisite minimum contacts with Florida necessary for personal jurisdiction to be asserted consistent with due process. *See Venetian Salami*, 554 So. 2d at

500–02 (citing, among others, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

Under Florida law as stated in *Venetian Salami*, "[a] defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position." 554 So. 2d at 502. In accordance with this rule, the affidavits of each of these four defendants were attached to their motions to dismiss. The affidavits alleged that long-arm jurisdiction was lacking and that due process prevented the exercise of personal jurisdiction over these defendants.

All four affidavits contested the allegation that these defendants had committed a tort in Florida as necessary to satisfy the long-arm statute. The affidavits alleged that these defendants did not broadcast or distribute any defamatory statement in Florida, meaning that none of the defendants committed the tort of defamation in Florida. *See Lowery v. McBee*, 322 So. 3d 110, 114 (Fla. 4th DCA 2021) (noting that "[u]nder Florida law, a cause of action for defamation toward a private individual requires five elements" and the first element is publication); *see also Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) (providing the elements of cause of action for defamation and listing publication as the first element).

Red Marble's president, Mr. Fitzpatrick, stated in his affidavit that Red Marble is an independent television production company in New York City. He also stated that the company does not distribute or license television shows for distribution. Red Marble denied broadcasting or distributing the episode in question and stated, through Mr. Fitzpatrick, that neither the company nor any employee or contractor performed any work in Florida to film, develop, or otherwise create the episode. Similarly, the three corporate officers stated under oath in their affidavits that they had no role in broadcasting, distributing, or licensing the episode at issue and none of them had any contacts such as work, residence, business ownership, property, or financial accounts in Florida. These defendants' affidavits supported their arguments

in the motions to dismiss that they did not publish the episode and thus did not commit the tort of defamation in Florida.

When a defendant's affidavit contains factual allegations that, taken as true, show that his or her acts do not subject the defendant to long-arm jurisdiction, "the burden shifts back to the plaintiff to prove by affidavit or other sworn proof that a basis for long-arm jurisdiction exists." *Hilltopper*, 955 So. 2d at 602. Mr. White did not file an affidavit or other sworn proof with his response to Red Marble and the three corporate officers' affidavits. Mr. White instead relied on *Internet Solutions Corporation v. Marshall*, 39 So. 3d 1201 (Fla. 2010), as support for his contention that these defendants had committed torts in Florida so that long-arm jurisdiction was present over them.

In *Internet Solutions*, the Court held that the long-arm statute is satisfied "when the nonresident makes allegedly defamatory statements about a Florida resident by posting those statements on a website, provided that the website posts containing the statements are accessible in Florida and accessed in Florida." *Id.* at 1216. Mr. White's contention was that by broadcasting the allegedly defamatory episode into Florida, the four defendants committed a tort here. But, as mentioned, Mr. White did not attach an affidavit to his response.[1] So there was no record evidence at the time of the hearing on the motion to dismiss that the allegedly defamatory episode was accessible in Florida or was accessed by anyone in Florida to show publication in Florida. "If

[1] At the end of the hearing on the motions to dismiss, the trial judge announced that she was granting the motions. But before a written order of dismissal was entered, Mr. White filed what he called an "affidavit" describing various statements third parties had allegedly made to him about viewing the episode. However, Mr. White did not swear to the truth of his statements, as required for an affidavit by section 92.525, Florida Statutes. The filing also contained only inadmissible hearsay. Thus, even had it been filed before the motion to dismiss hearing, this document did not constitute sworn proof to refute Red Marble and its three corporate officers' sworn affidavits that they did not participate in publication of the program in Florida.

the plaintiff fails to come forward with sworn proof to refute the allegations in the defendant's affidavit and to prove jurisdiction, the defendant's motion to dismiss must be granted." *Hilltopper*, 955 So. 2d at 602.

The three Red Marble corporate officers also argued in their motion to dismiss that the allegations against them pertained only to actions within the scope of their employment, thereby preventing the exercise of personal jurisdiction over them. *See Doe v. Thompson*, 620 So. 2d 1004, 1005–06 (Fla. 1993) (citing section 48.193(1), Florida Statutes, to require that a person act "personally" or through an agent, and not on behalf of a corporation, to fall under the long-arm statute). Their affidavits confirmed that any actions these individuals undertook related to the episode were solely in a corporate capacity. Because the amended complaint never alleged that these three defendants acted in their individual capacities and not on behalf of Red Marble in connection with the reality show episode, they asserted that the corporate shield doctrine applies to each of them.

Mr. White appeals the trial court's order granting dismissal. We review de novo orders granting or denying a motion to dismiss for lack of personal jurisdiction. *Dyck-O'Neal, Inc. v. Huthsing*, 181 So. 3d 555 (Fla. 1st DCA 2015) (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1256 (Fla. 2002)). After our de novo review of the trial court's determination on personal jurisdiction over these four nonresident defendants, and strictly construing the long-arm statute as required, *see Rautenberg v. Falz*, 193 So. 3d 924, 928 (Fla. 2d DCA 2016), we agree with the trial court ruling.

The four nonresident defendants challenged the jurisdictional allegations of the amended complaint and supported their challenges with sworn affidavits contesting the facts required to support long-arm jurisdiction. By doing so, the burden then shifted back to Mr. White to show long-arm jurisdiction with sworn proof. *See Venetian Salami*, 554 So. 2d at 502. Mr. White failed to provide proof.

In addition, the corporate shield doctrine applied to the three individual corporate officers given the allegations in the amended complaint, precluding each of them from being haled into a Florida court for "acts performed not for his own benefit but for the benefit

of his employer." *Doe*, 620 So. 2d at 1006. As we stated in *LaFreniere v. Craig-Myers*, 264 So. 3d 232, 237 (Fla. 1st DCA 2018), "The corporate shield doctrine provides that personal jurisdiction cannot be exercised over a nonresident corporate employee sued individually for acts performed in a corporate capacity."

Since the Florida long-arm statute was not satisfied, we do not have to consider whether these defendants had sufficient minimum contacts with Florida such that due process would not be violated by the exercise of personal jurisdiction. *Rautenberg*, 193 So. 3d at 930. Accordingly, we affirm the final order dismissing Red Marble and its three corporate officers, Kevin Fitzpatrick, Stephen Dost, and Jonathan Santos, from the action for lack of personal jurisdiction.

Summary Judgment Based on Section 230 — 1D22-1321

In his amended complaint, Mr. White alleged that certain defendants, including defendant Microsoft Corp. (now appellee in case 1D22-1321), "are information content providers as defined in 47 U.S.C. § 230(e)(2)."[2] The amended complaint further alleged that Microsoft used search engines "through the internet or any other internet service" to make the defamatory statements available to others. According to paragraph 50 of the amended complaint, Microsoft's use of search engines and other internet services made it, and certain other defendants, "information content publishers." Mr. White sought to hold Microsoft liable for publishing the allegedly defamatory episode.

In its amended answer, Microsoft denied paragraph 50 and asserted as an affirmative defense:

> Plaintiff's claims are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). Microsoft is an online service provider and is therefore protected by Section 230 from claims against it

[2] This citation is a typographical error. The definition of "Information content provider" is found at 47 U.S.C. § 230(f)(3).

in this lawsuit which are based upon Microsoft's alleged publication of third-party content.

Microsoft then moved for summary judgment which asserted the company's immunity from suit for defamation under Section 230 as a matter of law. As support for its factual position in its motion for summary judgment, Microsoft argued and attached Mr. White's answer to an interrogatory about the publications for which he sought to hold Microsoft liable. *See* Fla. R. Civ. P. 1.510(c)(1)(A). Mr. White's answer listed eight Uniform Resource Locators (URLs or website addresses) as sources of access to the episode of "Evil Lives Here" that contained his photo. Microsoft also attached excerpts from Mr. White's deposition where he failed to identify any source of Microsoft's alleged defamation other than the URLs. Mr. White could not specify any other sources of the episode to be found using Microsoft's Bing search engine.

Mr. White filed a response to Microsoft's motion for summary judgment. *See* Fla. R. Civ. P. 1.510(c)(5). In the response, Mr. White argued that Section 230 did not apply to immunize Microsoft from the defamation action because Microsoft was a direct publisher of the allegedly defamatory content. Mr. White's response cited no record evidence in opposition to the motion. Rather, Mr. White's argument was that as a matter of law, summary judgment should be denied.

Four days before the scheduled hearing on the motion for summary judgment, Mr. White filed a motion to postpone the hearing. Mr. White alleged that Microsoft had failed to provide adequate answers to his recent requests for admission, requests for production, and written interrogatories. This discovery had been served by Mr. White a month before the scheduled hearing on the motion for summary judgment, and timely responses were filed by Microsoft less than a week before the hearing.

At the hearing on the motion for summary judgment, the trial court first addressed the motion to postpone. Mr. White argued that he needed better responses to the recent discovery, while Microsoft argued that there had been ample time for discovery. The trial court agreed with Microsoft and denied the motion to postpone.

The parties then argued the motion. Microsoft again argued that none of the eight URLs submitted by Mr. White were authored by Microsoft, as shown on the pages identifying the authors. Mr. White argued that Section 230 did not apply since Microsoft was the publisher of the information. He argued that Microsoft became a "direct publisher" and "information content provider" through its sales of streaming access to the allegedly defamatory episode. Mr. White supported his argument with two letters between counsel during the litigation containing communication from Microsoft's representative that Microsoft was requesting another entity to remove access to the episode from its "platforms." One letter noted that "Microsoft is also aware that the episode that is the subject of Mr. White's Complaint was accessible for online/digital streaming through certain of Microsoft's platforms. Microsoft is undertaking efforts to remove the episode from its platforms." Mr. White argued that these communications amounted to admissions by Microsoft that it was a direct publisher of the defamatory material.

The trial court found no genuine dispute of material fact and that Microsoft had met its burden under rule 1.510, Florida Rules of Civil Procedure. In the written order granting summary final judgment, the trial court said that "Plaintiff's claim against Microsoft is barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230." Mr. White challenges the denial of his motion to postpone as well as the order granting summary final judgment.

We review the trial court's denial of the motion to continue (or postpone) the summary judgment hearing under an abuse of discretion standard. *Florida Gas Transmission Co., LLC v. City of Tallahassee*, 230 So. 3d 912 (Fla. 1st DCA 2017). We find no abuse of the trial court's discretion in denying Mr. White's motion to postpone the hearing on Microsoft's motion for summary judgment.

Microsoft argues that Mr. White did not comply with rule 1.510(d) since he did not provide an affidavit or declaration as required by the rule to justify the need for a postponement. *See Vella v. Salaues*, 290 So. 3d 946, 950 (Fla. 3d DCA 2019). We do not reach the issue as to whether Mr. White's counsel's argument for postponement was a "declaration" under rule 1.540(d). This is

because the discovery at issue was submitted by Mr. White too late for the responses to be used in opposition to summary judgment per rule 1.510(c)(5). Even had Mr. White been satisfied with all discovery responses from Microsoft, they could not have been filed at least 20 days before the summary judgment hearing as required by rule 1.510(c)(5). Thus, there was no abuse of discretion in the trial court's denial of the motion to postpone since the responses could not have been used in opposition to Microsoft's motion.

As for the summary judgment, as we explained in *Nazzal v. Florida Department of Corrections*, 267 So. 3d 1094, 1096 (Fla. 1st DCA 2019), "We review the final summary judgment under the de novo standard of review. *See Futch v. Wal-Mart Stores, Inc.,* 988 So. 2d 687, 690 (Fla. 1st DCA 2008). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Whether summary judgment was appropriate here turns on whether Microsoft was acting as an "interactive computer service" and thereby immune from State law claims under Section 230. *See* Art. VI, U.S. Const. (making federal law "the supreme Law of the Land" and preempting "Laws of any State to the Contrary").

Section 230(c)(1) states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(e)(3) provides in part, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." If Microsoft was acting as an interactive computer service as to the alleged defamatory episode, then it was not a publisher of the episode per Section 230, and it could not be liable for defamation. *See Lowery*, 322 So. 3d at 114 (requiring the element of publication to prove a cause of action for defamation); *Jews for Jesus*, 997 So. 2d at 1106 (same).

"The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet. . . ." 47 U.S.C. § 230(f)(2). An interactive computer service differs from an "information content

provider" which is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). "Thus, there is a dividing line between 'interactive computer service' providers—which are generally eligible for CDA section 230 immunity—and 'information content provider[s],' which are not entitled to immunity." *Bennett v. Google. LLC*, 882 F.3d 1163, 1166–67 (D.C. Cir. 2018) (footnotes omitted) (citing *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014)).

Section 230 clearly preempts Florida law. *See Doe v. America Online, Inc.*, 783 So. 2d 1010, 1013 (Fla. 2001); *Giordano v. Romeo*, 76 So. 3d 1100, 1101–02 (Fla. 3d DCA 2011). Furthermore, "section 230 of the CDA 'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Id.* at 1102 (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).[3]

The persons who posted the information on the eight URLs provided by Mr. White were the "information content providers" and Microsoft was the "interactive service provider" as defined by 47 U.S.C. § 230(f)(2) and (3). *See Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019) (noting that a search engine falls within the definition of interactive computer service); *see also In re Facebook, Inc.*, 625 S.W. 3d 80, 90 (Tex. 2021) (internal citations omitted) ("The 'national consensus' . . . is that 'all claims' against internet companies 'stemming from their publication of information created by third parties' effectively treat the defendants as publishers and are barred."). "By presenting Internet search results to users in a relevant manner, Google, Yahoo, and Microsoft facilitate the operations of every website on the internet. The CDA was enacted precisely to prevent these types of interactions from creating civil liability for the Providers." *Baldino's Lock & Key Serv., Inc. v. Google LLC*, 285 F. Supp. 3d

[3] *Doe v. America Online* also cited *Zeran* extensively and with approval.

276, 283 (D.D.C. 2018), *aff'd sub nom. Marshall's Locksmith Serv.*, 925 F.3d at 1265.

In *Dowbenko v. Google Inc.*, 582 Fed. App'x 801, 805 (11th Cir. 2014), the state law defamation claim was "properly dismissed" as "preempted under § 230(c)(1)" since Google, like Microsoft here, merely hosted the content created by other providers through search services. Here, as to Microsoft's search engine service, the trial court was correct to grant summary judgment finding Microsoft immune from Mr. White's defamation claim by operation of Section 230 since Microsoft did not publish any defamatory statement.

Mr. White argues that even if Microsoft is immune for any defamation occurring by way of its internet search engine, Microsoft is still liable as a service that streamed the subject episode. Mr. White points to the two letters from Microsoft in support of his argument. For two reasons, we do not reach whether an internet streaming service is an "interactive service provider" immunized from suit for defamation by Section 230.

First, the trial court could not consider the letters in opposition to the motion for summary judgment. The letters were not referenced in Mr. White's written response to Microsoft's motion. They were only in the record in response to a different defendant's motion for a protective order. So the trial court could disregard the letters in ruling on Microsoft's motion. *See* Fla. R. Civ. P. 1.510(c)(5); *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1136 (Fla. 4th DCA 2022). Without the two letters, Mr. White has no argument that Microsoft was a publisher of the episode.

Second, even considering the two letters referenced by Mr. White, they do not show that Microsoft acted as anything but an interactive computer service. That the subject episode was possibly accessible for streaming via a Microsoft search platform does not mean that Microsoft participated in streaming or publishing the episode.[4]

[4] For example, if one were to conduct an internet search for streaming services on Bing, found a link to Netflix's website, and

Microsoft's counsel stated in one letter, "I understand that users may still have the ability to view the Episode by using the Bing search engine to access the Episode through sources hosted by [third parties]." This is no more than Microsoft offering search engine services, which, as discussed above, have repeatedly found to be protected by Section 230. *See Marshall's Locksmith Serv. Inc.*, 925 F.3d at 1268; *Dowbenko*, 582 Fed. App'x at 805.

The trial court was correct to grant summary judgment finding Microsoft immune from Mr. White's defamation claim under Section 230.

Finally, Mr. White argues that the trial court's order granting Microsoft's motion lacks sufficient "reasons for granting or denying the motion" as required by rule 1.510(a). We disagree. The order stated that there were no genuine issues of material fact and that Mr. White's claim was barred by Section 230. This was a sufficient statement of the trial court's reason for granting the motion under rule 1.510(a).

As a result, the final order granting summary judgment for Microsoft and dismissing Mr. White's claim against Microsoft was proper and is affirmed.

AFFIRMED.

WINOKUR, J., concurs; LONG, J., concurs with opinion.

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then accessed Netflix's website to stream an allegedly defamatory movie, any action by Bing was as an "interactive service provider" immune from suit under Section 230 for providing internet search. We do not address whether in such a scenario Netflix, the streaming service, would be immune from any suit for defamation by operation of Section 230.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

LONG, J., concurring.

I concur with the Court that under section 230(c)(1), Microsoft cannot be treated as a publisher of the defamatory statements in this case. But if section 230 did not exist, Microsoft may be liable under Florida law for republishing the defamatory material. *See Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001) ("[E]very repetition of a defamatory statement is considered a publication.").

I question section 230(c)(1)'s constitutionality as applied to state defamation law. 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."); *Doe*, 783 So. 2d at 1013 (holding section 230(c)(1) preempts state defamation law). The Telecommunications Act of 1996 amended the Communications Act of 1934 to include, among other things, the following: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The constitutional authority Congress relied on was its power to "regulat[e] interstate and foreign commerce in communication." 47 U.S.C. § 151.

Article I, section 8, gives congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States." The question, then, is whether the original public meaning of the federal authority to "regulate Commerce . . . among the several States" conveyed the power to nationalize state common law defamation actions.

Defamation actions were undoubtedly a matter of state common law at the founding. § 2.01, Fla. Stat. (1829) (adopting the common law "down to the 4th of July, 1776"); *Miami Herald*

Pub. Co. v. Ane, 423 So. 2d 376, 383 (Fla. 3d DCA 1982) (explaining that "Florida tort law followed the common law of defamation" before the *New York Times* decision in 1964). The Supreme Court recognized long ago that "there is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The only federal common law that survived *Erie* were rules of decision applicable to "federal questions [that] cannot be answered from federal statutes alone." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 305 (1981). This necessarily put defamation law squarely with the states. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369–70 (1974) (White, J., dissenting) ("For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures."). The federal government "is acknowledged by all, to be one of enumerated powers" and all other powers were reserved to the states. *M'Culloch v. State*, 17 U.S. 316, 405 (1819).

It borders the preposterous to conclude that, at the time of ratification in 1788, the people understood the so-called commerce clause to be a vehicle for stripping the states of the power to police defamation. "The Clause's text, structure, and history all indicate that, at the time of the founding, the term 'commerce' consisted of selling, buying, and bartering, as well as transporting." *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (internal quotation marks omitted); *see also United States v. Lopez*, 514 U.S. 549, 556 (1995) (explaining the importance of "the distinction between what is national and what is local" in considering the commerce clause and to avoid the creation of "a completely centralized government").

The internet, and related e-commerce, can certainly be interstate in nature. But the commerce clause was not intended to nationalize the whole of America law. Areas of law that were understood to be reserved to the states, were not enumerated in the Constitution, and are not directly related to the buying, selling, or transporting of goods and services were plainly not intended to be subject to federal regulation.

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